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No. 01-

IN THE

# Supreme Court of the United States

LOUIS DREYFUS NEGOCE S.A.,

*Petitioner,*

*v.*

BLYSTAD SHIPPING & TRADING INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should a mandatory London High Court forum selection clause in a multi-party indemnity agreement, made on a standard maritime industry form and relating to a change in performance required in an international business transaction, be enforced and claims for liability, loss or damage respecting the changed performance referred to a pending proceeding in the London High Court, notwithstanding the existence of an agreement for U.S. arbitration of disputes arising under an earlier agreement between two of the parties?

2. In an international business transaction, does the Second Circuit's rule requiring arbitration in the U.S. of claims arising under a subsequently made "collateral" indemnity contract, containing its own mandatory London High Court forum selection clause, because the claims may be said to "touch matters" covered by an earlier agreement containing an arbitration clause, impermissibly elevate a presumption of arbitrability over an express choice of a different forum which is capable of fully adjudicating the claims among multiple parties, in violation of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-20 (1972) and other decisions of this Court?

## STATEMENT PURSUANT TO RULE 29.6

Petitioner Louis Dreyfus Negoce S.A. ("Dreyfus") is a corporation organized and existing under and by virtue of the laws of the Republic of France and its stock is 100% owned by S.A. Louis Dreyfus & Cie, Paris.

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Appendix C — Opinion And Order Of The United States District Court For The Southern District Of New York Dated February 29, 2000 ..... 31a

Dreyfus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published at 252 F.3d 218 (2d Cir. 2001) (App. A).

The opinion of the United States District Court for the Southern District of New York denying Dreyfus' motion for a stay of arbitration is reported at 88 F. Supp. 2d 168 (S.D.N.Y. 2000) (App. C).

The opinion of the District Court denying Dreyfus' motion for reconsideration is reported at 94 F. Supp. 2d 474 (S.D.N.Y. 2000) (App. B).

## STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the judgment below was entered on June 7, 2001. This Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving

> commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (2001).

## STATEMENT OF THE CASE

### A. The Facts

In this case, arising out of an international sales and shipping transaction, Dreyfus appeals from an order of the United States Court of Appeals for the Second Circuit ("Second Circuit") requiring Dreyfus to arbitrate damage and indemnity claims made by Respondent, Blystad Shipping and Trading Inc. ("Blystad"), in New York, despite the fact that Dreyfus, Blystad and several other parties to the transaction had, at Blystad's request, jointly entered into back to back "collateral" indemnity contracts in which they agreed to resolve all such claims in the High Court of Justice of England ("London High Court") under English law, and even though all parties involved have actually appeared in proceedings initiated in that court by Blystad.

In 1996, Dreyfus, a French corporation, entered into a contract with Lief Enterprises Pty. Ltd. ("Lief"), an Australian corporation, for the sale of soyabean oil. The sales contract required Dreyfus to arrange for the transportation of the soyabean oil from the U.S. to a port to be specified in China.

To perform its transportation obligation under the sales contract, on November 27, 1996 Dreyfus entered into a tanker voyage charter party (the "Voyage Charter") with Blystad, a Liberian corporation, requiring the vessel M.T. THORSFREDDY (the "Vessel") to carry the soyabean oil from the U.S. Gulf to one or two ports to be named in China. The Voyage Charter stated in its preamble that the delivery of the soyabean oil was to be "as ordered on signing bills of lading" and further provided in Clause 6(c) that in the event it later became necessary to change the discharge port designated in the bills of lading, "Any change in loading or discharging ports or berths shall be made only as the result of special agreement in writing between Charterer and Owner." The Voyage Charter also contained an arbitration clause providing that "any dispute arising from the making, performance or termination of this Charter Party" was to be arbitrated in New York.

At the time, Blystad was operating the THORSFREDDY under a contract of time charter party (the "Time Charter") with the vessel's registered owners, Thorsfreddy K/S ("Thorsfreddy"). The Time Charter provided that in the event it became necessary during the course of any given voyage to change the originally designated discharge port and/or to discharge cargo without production of bills of lading, Blystad was to provide Thorsfreddy with a letter of indemnity with content "in accordance with Owners' P and I Club wording covering non-availability of original Bills of Lading at discharge port(s) or change in discharge port(s)." This requirement reflected the fact that a vessel owner's liability insurance, referred to as protection and indemnity ("P&I") insurance, does not cover liabilities arising from the delivery of cargo without surrender of original bills of lading or discharge at a port other than the port designated in the bills of lading.

The Vessel loaded in the U.S. Gulf in December 1996 and, following instructions received from Lief, bills of lading were issued on behalf of the Vessel providing for discharge at Qingdao, China. At some point Lief in turn sold the soyabean oil to Kaland Limited ("Kaland"), based in Hong Kong, creating a "string" of sales contracts.

During the course of the Vessel's voyage to China, it became necessary to arrange for discharge of the soyabean oil without production of bills of lading and to change the discharge port from Qingdao to Qin Huang Dao. Blystad requested Dreyfus to issue a letter of indemnity in the form recommended by Thorsfreddy's P&I insurer respecting these changes in performance under the Voyage Charter and Dreyfus passed this request on to Lief. The letter of indemnity form used in this case was a standard maritime industry form providing that the issuer would indemnify the beneficiary "in respect of any liability, loss or damage of whatsoever nature which you may sustain by reason of delivery of the goods . . . in accordance with our request". This letter of indemnity form also contained a mandatory forum agreement reading as follows:

> This indemnity shall be construed in accordance with English Law and each and every person liable under this indemnity shall, at your request, submit to the jurisdiction of the High Court of Justice of England.

In response to Blystad's request, Lief provided two sets of letters of indemnity, in the form requested by Blystad, addressed to Blystad as "owners" and Dreyfus as "charterers". One set was sent directly to Blystad by Lief and one to Dreyfus. Dreyfus endorsed these letters by

copying them on its letterhead, signing and forwarding them to Blystad. In this way, the letters of indemnity effectively created a tripartite agreement among Blystad, Dreyfus and Lief expressly providing for indemnity on the terms of the P&I insurer's letter of indemnity form, including its English law/London High Court forum selection clause. In response Blystad advised Dreyfus that these letters of indemnity were all in order and that the Vessel had been instructed to discharge the soyabean oil at the newly designated port of Qin Huang Dao.

Following the discharge of the soyabean oil at Qin Huang Dao, the Vessel was arrested by order of the Tianjin Maritime Court, and remained under arrest for several months. The basis for the arrest was the Vessel's delivery of the soyabean oil without production of original bills of lading and at Qin Huang Dao instead of Qingdao, the very matters addressed by the letters of indemnity.

Thorsfreddy having obtained an arbitration award against Blystad for damages suffered by reason of the Vessel's arrest, Blystad now seeks to pass that liability as well as its own damages on to Dreyfus.

On March 5, 1997, Blystad commenced an action in the London High Court pursuant to the letters of indemnity, naming both Dreyfus and Lief as defendants. This action alleged breaches of the letters of indemnity and asserted claims for all liability, loss and damage suffered as a result of complying with the request that the Vessel discharge at Qin Huang Dao and without production of bills of lading. Both Dreyfus and Lief appeared in the London High Court and filed responsive pleadings. Dreyfus pleaded defenses under the letters of indemnity, but also claimed against Lief

in that action for indemnity for any liability it might have to Blystad. Lief in turn filed a third party claim against Kaland, claiming indemnity and/or damages under a letter of indemnity which had been given by Kaland to Lief on the same P&I insurer's form. This entire action remains pending in London.

The London proceedings notwithstanding, on March 13, 1997, Blystad demanded arbitration with Dreyfus in New York pursuant to the Voyage Charter, asserting a claim against Dreyfus alone for compensation for damages and indemnity in connection with the Vessel's discharge of the soyabean oil at Qin Huang Dao.

**B. The Proceedings Below**

Dreyfus commenced this litigation to enforce the London High Court forum selection clause in the letters of indemnity on the ground that Blystad's claims, by their terms, arose under the letters of indemnity. In an opinion and order dated February 29, 2000, the District Court rejected Dreyfus' request, accepting at face value Blystad's statement that some part of its claims arose under the Voyage Charter, and finding that while the letters of indemnity were separate, side agreements which were "collateral" to the Voyage Charter, Blystad's claims under the letters of indemnity "clearly touch[ed] matters covered by the Voyage Charter" and, as such, were also arbitrable. Pet. App. 52a. In reaching this conclusion, the court was guided by the federal policy favoring arbitration and the "touch matters" test set forth by the Second Circuit in *Collins &. Aikman Products Co. v. Bldg. Systems, Inc.*, 58 F.3d 16, 19-20 (2d Cir. 1995), which holds that claims arising under collateral contracts will be subject to a broad arbitration clause in the main contract when the claims may be said to "touch matters" covered by the main contract. Pet. App. at 51a-52a.

Dreyfus moved for reconsideration, arguing *inter alia* that the choice between arbitration in New York and litigation in London was a question of intent, and that since the letters of indemnity were the more recent agreements and specifically addressed claims arising in connection with the Vessel's discharge at Qin Huang Dao, they clearly evinced an intention that all such claims among the parties would be resolved in one proceeding in the London High Court under English law. The District Court refused to grant Dreyfus' motion for reconsideration, stating that although the Court had "little doubt of the parties' intent that claims arising solely under the letters of indemnity be heard in the London High Court", those claims "touched matters" covered by the Voyage Charter and, therefore, "[u]nder established Second Circuit doctrine, those claims must be arbitrated." *Id.* at 28a-29a.

The Second Circuit affirmed the judgment of the district court on the basis of the federal policy favoring arbitration and the "touch matters" test articulated in *Collins*, but ignored in its reasoning the mandatory London High Court forum selection clause. *Id.* at 1a-23a.

Dreyfus seeks a writ of certiorari to review so much of the decision below as required arbitration of Blystad's claims under the letters of indemnity despite the London High Court forum selection clause, simply because those claims superficially "touched matters" covered by the Voyage Charter.

## REASONS FOR GRANTING THE WRIT

When the parties to a multi-party international business transaction express an intention to resolve their disputes in a single proceeding in one forum under one body of law, international trade and commerce are best served when the courts honor and enforce that intent. The Second Circuit's application of the "touch matters" test in this case is the end product of a line of decisions in that Circuit which have so indulged and expanded the "presumption" in favor of arbitration that the "presumption" has now impermissibly outweighed an actual express choice of another forum. Where there is conflict between an arbitration clause and a foreign forum selection clause in the context of a multi-party international business transaction, the presumption in favor of arbitration must give way to the express designation of another forum where all facets of the dispute can be dealt with in a single, uniform proceeding involving all of the interested parties.

The Second Circuit's improper application of the "touch matters" test to a collateral contract containing a foreign forum selection clause is by no means limited to the parties to this case. The decision below will apply to all international business transactions where the parties attempt to supercede a two-party domestic arbitration clause with an all encompassing multi-party foreign forum selection clause. Accordingly, this Court should exercise its jurisdiction to correct the Second Circuit's misapplication of the "touch matters" test before it is followed in other Circuits in other cases,[1] and thereby preserve the right of parties in

1. Some version of the "touch matters" test has already been applied in other circuits. *See P&P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861 (10th Cir. 1999); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d (Cont'd)

international commerce to provide for a complete and efficient resolution of disputes that may arise among them.

## I. THE DECISION BELOW IMPROPERLY ELEVATES A PRESUMPTION OF ARBITRABILITY OVER AN EXPRESS CHOICE OF A FOREIGN FORUM, IN VIOLATION OF *BREMEN v. ZAPATA*

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court held that where the parties to an arms-length business transaction agree to resolve their disputes in a foreign forum, the United States courts should honor and enforce that agreement. Notwithstanding the possibility that the foreign court would enforce provisions in the towage contract there involved which would exculpate one party and which an American court might refuse to enforce, this Court gave full effect to the choice-of-forum clause. *Bremen* recognized that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting". *Id.* at 13, 14. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 623, 629-630 (1985); *Vimar Seguros Y Reaseguros S.A. v. M/V SKY REEFER*, 515 U.S. 528, 538-539 (1995).

Similar considerations compelled the Court to enforce a foreign arbitration provision in an international contract in

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(Cont'd)
716 (9th Cir. 1999); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte, GmbH*, 141 F.3d 1434 (11th Cir. 1998); *Pennzoil Expl. and Prod. Co. v. Ramco Ener. Ltd.*, 139 F.3d 1061 (5th Cir. 1998); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996).

*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in which the Court stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516-517.

In the present case, the letters of indemnity were requested by Blystad in consideration of discharging the soyabean oil without production of original bills of lading and changing the Vessel's discharge port to Qin Huang Dao. Performance on this basis was contrary to the requirements of commercial law and the terms of the Voyage Charter, which required discharge at the port specified in the bills of lading. Further, this performance exposed the Vessel and its owners to liabilities which were not covered by the usual P&I liability insurance.

In these circumstances, it was important to have an indemnity agreement in place respecting any liabilities which might arise out of the changed performance by the Vessel and, in the event of any disputes respecting the indemnity agreement, to specify a governing law and a forum in which all such disputes could be resolved. English law and the London High Court are the usual choices of maritime interests in this situation. Blystad specifically requested that the letters of indemnity be issued in accordance with Thorsfreddy's "P and I Club wording" which included the agreement that "This indemnity shall be construed in

accordance with English Law and each and every person liable under this indemnity shall, at your request, submit to the jurisdiction of the High Court of Justice of England". As in *Bremen* and *Scherk*, the English law/London High Court forum selection clause in this case was an important element in the parties' contractual arrangements because it enabled them to provide for the full resolution of multi-party claims in an orderly and predictable fashion.

Blystad demonstrated its understanding that any claims for liability, loss or damage respecting the Vessel's discharging the soyabean oil at Qin Huang Dao and without production of bills of lading should be submitted in London for, following the arrest of the Vessel, it commenced suit in the London High Court against both Dreyfus and Lief, pleading breaches of the letters of indemnity. However, apparently being advised that there might be legal defenses to its claims under English law, it subsequently demanded arbitration with Dreyfus alone in New York, pursuant to the arbitration agreement contained in the Voyage Charter. While Dreyfus, Lief and Kaland have all appeared and answered Blystad's claims in London, in a suit which remains pending there, Blystad prefers to proceed solely against Dreyfus in the New York arbitration.

As there is no basis for "impleader" in arbitration, and a consolidated arbitration is not possible without the agreement of all parties, *The Government of the United Kingdom of Great Britain v. The Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), Dreyfus is unable to bring Lief into the New York arbitration commenced by Blystad. Accordingly Blystad's actions effectively isolate Dreyfus and expose it to liabilities to Blystad which it may not be able to pass down the "string" of sales contracts to Lief. This is in contravention of the

parties' expressed intent that all claims resulting from the Vessel's discharge at Qin Huang Dao should be submitted in one proceeding under one body of law in one named court where all parties could be joined for a full and complete resolution of the claims.

In denying Dreyfus' motion to stay the New York arbitration and enforce the London High Court forum selection clause, the Second Circuit recognized that arbitration is a "creature of contract" and that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit". However, finding the arbitration clause in the Voyage Charter was a "broad" arbitration agreement, giving rise to a presumption of arbitrability, the Second Circuit, without discussion of the London High Court forum selection agreement contained in the letters of indemnity, held that the letters of indemnity "implicate at least two clauses of the charter" and "[b]y implicating the rights of Blystad and the duties of Dreyfus under the charter party, the letters of indemnity are within the scope of the broad arbitration clause". Pet. App. 10a, 21a.

It is respectfully submitted that the Second Circuit's decision improperly elevates a presumption of arbitrability over an express choice of a foreign forum.

Unaddressed by the Second Circuit is the question of what analysis should be applied when a dispute may be "presumptively" subject to an arbitration clause and, at the same time, explicitly subject to a mandatory foreign forum selection clause. The Second Circuit has simply applied in this case a rule which effectively mandates submission of all disputes to arbitration even when, by application of standard rules of contract construction, the intention of the

parties was clearly to refer certain disputes to a foreign forum. In practice, the so called "touch matters" test employed by the Second Circuit elevates the presumption of arbitration over the intention of the parties, in violation of both *Bremen v. Zapata*, and the general rule that arbitration is a creature of contract.

It is a fundamental rule of contract construction that an interpretation of a contract "that gives a reasonable and effective meaning to all the terms of the contract is generally preferred to one that leaves a part unreasonable or of no effect". *Garza v. Marine Transport Lines, Inc.* 861 F.2d. 23, 27 (2d Cir. 1988) (quoting *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985)). Moreover, "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." *Restatement (Second) of Contracts* § 202(2). *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (recognizing the cardinal principle of contract construction that "a document should be read to give effect to all its provisions and to render them consistent with each other.") Furthermore, "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." *Restatement (Second) of Contracts* § 203(d). *See also United States v. Rice*, 317 U.S. 61, 67 (1942).

It is respectfully submitted that the subsequently agreed-to letters of indemnity must be read together with the Voyage Charter in order to make sense of the parties' contractual arrangements. E. Allan Farnsworth, *Contracts (Second Edition)*, § 7.10 at 511-12. Looking at the present transaction as a whole, it is clear that Blystad's claims relating to the consequences of discharging the soyabean oil at Qin Huang

Dao arise under the "collateral agreement". And it is equally clear that the parties intended the London High Court to be the exclusive jurisdiction for resolution of such claims because multiple parties were involved and, while the procedures of the London High Court permit impleader of all interested parties, U.S. arbitration does not. Blystad having commenced proceedings in London respecting its claims, all parties have been brought into those proceedings and stand ready to litigate the claims. The decision below is in error because it elevates a "presumption of arbitrability" over an express choice of a foreign forum and renders the London High Court forum clause in the letters of indemnity a nullity, in violation of *Bremen v. Zapata*. That incorrect conclusion was the inevitable result of the inappropriate and improper application of the "touch matters" test in this multi-party international business transaction.

## II. IN AN INTERNATIONAL BUSINESS TRANSACTION INVOLVING COLLATERAL CONTRACTS WITH A FOREIGN FORUM SELECTION CLAUSE OF THEIR OWN, THE "TOUCH MATTERS" TEST IS VAGUE AND UNPRINCIPLED

The "touch matters" test had its genesis in *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614, 625-26 (1985), in which this Court applied the test to determine whether statutory claims fell within the scope of a broad arbitration clause in a related sales contract.

The Second Circuit initially applied the "touch matters" test to determine whether tort and statutory claims fell within the scope of arbitration clauses in related contracts. *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 845-56 (2d Cir. 1987) (applying the "touch matters" test to

determine whether tort and statutory claims fell within arbitration clauses contained in purchase and sales agreements); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1049-54 (2d Cir. 1989) (applying the "touch matters" test to determine the arbitrability of tort claims pursuant to an employment agreement containing a broad arbitration clause when the torts allegedly occurred after the employment concluded); *Kerr-McGee Refining Corp. v. M/T TRIUMPH*, 924 F.2d 467, 468-71 (2d Cir. 1991) (applying the "touch matters" test to determine whether statutory RICO claims were arbitrable pursuant to a broad arbitration clause contained in the charter party); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991) (applying the "touch matters" test to determine the arbitrability of tort claims pursuant to a broad arbitration clause contained in the customer agreement).

More recently, the Second Circuit expanded the scope of the test and applied it to determine whether tort claims allegedly arising in connection with a collateral agreement which lacked a mandatory forum selection clause fell within the scope of a broad arbitration clause found in a related main contract. *Collins & Aikman Products Co. v. Bldg. Systems, Inc.*, 58 F.3d 16, 18-23 (2d Cir. 1995); *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74-75 (2d Cir. 1997).

In the present case, the Second Circuit has gone further still and used the "touch matters" test to determine whether a claim arising under a collateral contract which contains a mandatory forum selection clause falls within the scope of an arbitration clause found in a related main contract. In this context, however, the "touch matters" test proves unworkable because it compels the court to ignore the forum selection clause in the collateral contract, in violation of *Bremen v.*

*Zapata* and the basic tenet that the intention of the parties controls the issue of arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").

The "touch matters" test is but one of several formulated by the lower courts to determine whether certain factual allegations may subject a matter to arbitration. Other tests ask whether the allegations "arise from contract performance" *Popper v. Monroe*, 673 F. Supp. 1228, 1230 (S.D.N.Y. 1987), whether they are "integrally linked" to the contractual relation, or whether they somehow "pertain to it". *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 82 (2d Cir. 1983). The Second Circuit itself has questioned whether any of these formulations yields a principled way of deciding whether claims should be sent to arbitration. *See Leadertex, Inc. v. Morganton Dyeing & Finishing*, 67 F.3d 20, 28 (2d Cir. 1995).

However appropriate these tests may be in the context in which they were originally developed, Dreyfus respectfully submits that, in an international business transaction involving multiple parties and collateral contracts with their own forum selection clauses, none of these formulations yields a principled way of deciding whether a claim under a collateral contract is subject to an arbitration clause in a main contract. This is so because collateral contracts, by their nature, always "touch matters" or "pertain to" or "arise in connection with" the general subject matter of the main contract. To this extent, insofar as collateral contracts are concerned, the "touch matters" test is so vague as to be nearly

meaningless. It is further unprincipled in that it fails to implement the traditional principles of contract construction which were designed to give effect to the intention of the parties, the primary guide in determining whether a dispute is, in fact, arbitrable. *First Options*, 514 U.S. at 945; *AT&T*, 475 U.S. at 648.

That the "touch matters" test is vague and unprincipled is illustrated by the present case. In the decision below, the Second Circuit's analysis essentially stopped with the finding that Blystad's claims under the letters of indemnity "implicate[d] the parties' rights" under the Voyage Charter because both involved transportation of cargo to China, and because the Voyage Charter contained clauses contemplating the possibility of a change in discharge ports. Pet. App. 20a, 29a, 51a-52a. That the change in performance was sufficiently substantive that Blystad's P&I insurance would not cover any consequent liability, loss or damage and the parties deemed it necessary to execute a "special agreement in writing", as expressly contemplated by the Voyage Charter, to create a contractual indemnity to fill the void, was not addressed by the court. Nor were the fundamental rules of contract construction which would have required the court to consider that the letters of indemnity were a separately negotiated, later executed and purpose-specific portion of the parties' contractual arrangements, with an English law/London High Court forum clause of their own. All of these factors would have pointed to the conclusion that the parties intended their claims under the letters of indemnity to be resolved under English law in the London High Court in a single proceeding with all parties present. The application of the "touch matters" test in this context is unprincipled precisely because it prevented the court from conducting any such analysis and rendered the foreign forum selection clause a nullity.

To force a claim into arbitration on the basis of the "touch matters" test, where, as here, the collateral contract under which the claim arises contains a mandatory forum selection clause, ignores and frustrates the intention of the parties in violation of *Bremen v. Zapata* and *Mitsubishi*. The "touch matters" test and all similarly derived formulations should have no application to collateral contracts containing a mandatory foreign forum selection clause, and this Court should declare them to be inapplicable.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 7, 2001**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued October 24, 2000 Decided JUN 7, 2001)

Docket No. 00-7382

LOUIS DREYFUS NEGOCE S.A.,

*Petitioner-Appellant*,

v.

BLYSTAD SHIPPING & TRADING INC.,

*Respondent-Appellee*.

Before:

CARDAMONE, WINTER, and POOLER,
*Circuit Judges*.

* * *

CARDAMONE, *Circuit Judge*:

When changing horses in midstream much mischief may occur, outweighing the supposed advantages. In this appeal, the port of destination for an international shipment of cargo

was changed in mid-ocean, so to speak. But the result — as the facts here attest — was the same as when changing horses in midstream.

Louis Dreyfus Negoce S.A. (Dreyfus or appellant) appeals the February 29, 2000 order of the United States District Court for the Southern District of New York (Scheindlin, J.), which denied its motion to stay a New York arbitration in favor of proceedings in London before the High Court of Justice, Queens Bench Division. Dreyfus had a contract to deliver soyabean oil to China and needed a ship to transport the cargo. It therefore entered into a tanker voyage charter party with Blystad Shipping & Trading, Inc. (Blystad or charterer), a vessel charterer. During the voyage, Dreyfus requested that Blystad change the cargo discharge port, and issued letters of indemnity to the charterer for any liability that acquiescence to this request might engender.

When the chartered vessel was detained at the new discharge port for three months, Blystad sued Dreyfus in London on the letters of indemnity. A week after the charterer commenced the London lawsuit, it sought to enforce a provision of the charter party calling for arbitration of disputes between the signatories in New York. Dreyfus resisted arbitration in New York, contending that Blystad's claim must be brought under the letters of indemnity, rather than the charter party. Accordingly, Dreyfus asked the district court to stay the New York arbitration. When that request was denied, this appeal ensued.

*Appendix A*

## BACKGROUND

### *Genesis of the Dispute*

The facts of the instant litigation, arising from the transport of crude degummed soyabean oil from the United States to China, are largely undisputed. In 1993 Blystad, a Liberian corporation, entered into a time charter party with Thorsfreddy K/S (Thorsfreddy), owners of the M.T. THORSFREDDY (vessel). Under the charter, Blystad was allowed to direct the destination ports for the vessel and the cargo being transported, but Thorsfreddy as owner remained in charge of the operation of the vessel. The time charter provided that any dispute between Blystad and Thorsfreddy, brought pursuant to the agreement, would be arbitrated in New York.

Three years later, on November 27, 1996, Blystad entered into a tanker voyage charter party (charter party or charter) with appellant Louis Dreyfus Negoce S.A., a French corporation. Under the charter party Blystad leased the vessel to Dreyfus for a single voyage. Dreyfus entered into this maritime agreement to carry out its obligations as seller under a sales contract, pursuant to which it had promised to deliver 25,000 metric tons of soyabean oil in China to the buyer, Lief Enterprises (Lief). Lief intended to sell the soyabean oil to Kaland Limited (Kaland), the ultimate purchaser.

The charter party provided for the transport of the soyabean oil from Brownsville, Texas and New Orleans, Louisiana, to one, or two, unspecified discharge ports in China. The preamble of the charter party stated that delivery

was to be "as ordered on signing bills of lading to the port or ports of discharge," indicating that the tanker bills of lading would designate the discharge ports. The vessel was loaded in December 1996 and, following instructions from Lief, Dreyfus issued bills of lading on behalf of the vessel providing for discharge at Qingdao, China.

On January 13, 1997, in the midst of the voyage, Blystad advised Dreyfus that the vessel was scheduled to arrive in China in five days and that the original bills of lading had not arrived in Qingdao. Blystad therefore asked Dreyfus to arrange for a letter of indemnity from Lief and forwarded a draft form for such letter, so that the vessel could discharge its cargo upon arrival. Blystad declares that since a carrier is obligated to deliver its cargo only upon presentation of the original bill of lading, it has become common practice in the shipping industry for the receiver to issue a letter of indemnity promising to indemnify the carrier for any liability for delivery without the original bill. This practice reflects the fact that a vessel owner's protection and indemnity insurance typically does not cover the delivery of cargo without the original bill of lading.

Lief, following the orders of Kaland, the ultimate purchaser, on January 15, 1997 requested that Dreyfus change the discharge port to Qin Huang Dao, China. Appellant informed Blystad that it, as the seller, and Lief, as the receiver, would issue letters of indemnity covering both the change of discharge ports and the discharge of cargo without presentation of the original bills of lading. Clause 6(c) of the charter party specifically covered appellant Dreyfus' obligations when requesting a change in destination

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> [Dreyfus] warrants that the cargo shall be discharged at the ports and berths specified [by the original bills of lading]. Any change in loading or discharging ports or berths shall be made only as the result of special agreement in writing between [Dreyfus] and [Blystad], and in such case, [Dreyfus] shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby.

On January 20 Lief provided two letters of indemnity to Dreyfus, in the form requested by Blystad, and addressed them to Blystad as "owners" and Dreyfus as "charterers." Dreyfus endorsed these letters, superimposed them on its own letterhead and forwarded them to Blystad, which then forwarded them to Thorsfreddy. After Thorsfreddy said the letters were satisfactory, Blystad instructed the vessel to discharge the soyabean cargo at the newly designated port of Qin Huang Dao.

The letters guaranteed that Dreyfus, and in turn Lief, would indemnify Blystad "in respect of any liability, loss or damage of whatsoever nature which you may sustain by reason of delivering the goods to China Ocean Shipping Agency, Qin Huang Dao," and requested delivery to that city without presentation of the original bills of lading. The letters also contained a choice of law and choice of forum clause, providing that "[t]his indemnity shall be construed in accordance with English Law and each and every person liable under this indemnity shall, at your request, submit to the jurisdiction of the High Court of Justice of England."

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After the issuance of the letters of indemnity the vessel sailed on to Qin Huang Dao. Upon arrival, the soyabean oil was discharged and promptly seized by the Chinese Customs Bureau. The vessel was arrested by order of the Tianjin Maritime Court. The proffered reasons for the arrest were the delivery of cargo without production of the original bills of lading and the change in discharge ports from Qingdao to Qin Huang Dao. The vessel was detained at Qin Huang Dao until Thorsfreddy and Blystad paid security for its release three months later.

*Prior Legal Proceedings*

After the detention of its vessel, Thorsfreddy commenced arbitration in New York against Blystad, pursuant to the arbitration clause of the time charter between the parties. In an April 27, 1999 decision, the arbitration panel held that Blystad must indemnify Thorsfreddy under the time charter for the expenses incurred due to the detention of the vessel at Qin Huang Dao. On July 20, 2000 a final award was rendered in Thorsfreddy's favor in the sum of $659,268.67.

On March 5, 1997 Blystad brought suit against Dreyfus and Lief in London before the High Court of Justice, Queens Bench Division, Commercial Court (London action), under the letters of indemnity. Blystad sought damages for breach of the January 20 letter-contracts, and indemnification pursuant to the letters for any losses due to the detention of the vessel and the discharge of its cargo at Qin Huang Dao. Dreyfus and Lief have since appeared in the London action, although Dreyfus has apparently urged that the letters of indemnity are inapplicable in that action and that the Queens

Bench thus has no jurisdiction. Its basis for this argument is that the soyabean oil was not delivered to the China Ocean Shipping Agency as provided for in the letters of indemnity, but instead was seized by the Chinese Customs authority. Notwithstanding these objections, Dreyfus and Lief have both since responded to Blystad's claim in the London action, Dreyfus has interposed an indemnity claim against Lief, and Lief has impleaded Kaland and asserted its own third-party claim for indemnity. The London action is still pending.

A week after initiating the London action, Blystad — allegedly because of Dreyfus' objections to jurisdiction in London — demanded that Dreyfus participate in arbitration in New York. By letter of March 13, 1997 Blystad requested arbitration for "breach of charter" and sought "compensation for the damages it has suffered directly, and an indemnity for any and all liability it has or may suffer to third parties, as a result of Dreyfus' breach." This demand for arbitration was brought pursuant to clause 31 of the charter, entitled "Arbitration," which states "[a]ny dispute arising from the making, performance or termination of this Charter Party shall be settled in New York." Dreyfus responded to the request and, as provided for by the charter, appointed an arbitrator, but conditioned its response on its objection that Blystad's claim is subject to resolution in London, not New York.

On November 5, 1999 appellant petitioned the district court for an order: (1) declaring that Blystad's indemnity claim against Dreyfus is not subject to the New York arbitration; (2) staying further proceedings in the arbitration upon that claim; and (3) enforcing the choice of forum clause

of the letters of indemnity. In a February 29, 2000 order, the district court denied Dreyfus' motion, holding that Blystad's claim was within the scope of the charter's arbitration clause, and that Blystad had not waived its right to New York arbitration by bringing suit in London first. *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 88 F. Supp. 2d 168, 177-78 (S.D.N.Y. 2000). A subsequent motion for reconsideration was denied. *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 94 F. Supp. 2d 474, 476-77 (S.D.N.Y. 2000). Dreyfus appeals from the denial of its petition. We affirm.

## DISCUSSION

Dreyfus contends on appeal that the claim asserted by Blystad in the New York arbitration is outside the scope of the charter's arbitration provision, and that any potential claim by Blystad must be asserted in London under the letters of indemnity. In support of this proposition Dreyfus argues that clause 31 of the charter is a narrow arbitration clause, by which disputes that are collateral to the agreement's explicit provisions are excluded from arbitration. Dreyfus continues, saying that Blystad's claim is not directly under the charter because performance under that maritime agreement was allegedly concluded upon the fixing of the bills of lading, providing for transport of the cargo to Qingdao. Since clause 31 limits coverage to disputes "arising from the making, performance or termination" of the charter, and performance was allegedly completed upon the issuance of the bill of lading, any claim by Blystad concerning the voyage to Qin Huang Dao would have to be made under the letters of indemnity. Appellant concludes the letters of

indemnity are collateral agreements, so that a suit under them is thereby outside the scope of the narrow arbitration clause.

The district court ruled that although the letters of indemnity were collateral to the charter, the claims asserted thereunder touched upon matters covered by and implicated rights set out in the charter. *Louis Dreyfus Negoce*, 88 F. Supp. 2d at 174, 177. It did not believe it necessary to determine whether clause 31 was a broad or a narrow clause, *id.* at 173, and further rejected appellant's unvoiced but implicit claim that Blystad had waived its right to arbitration by first bringing suit in London, *id.* at 178.

I Blystad's Claim Is Within the Scope of Clause 31

We review *de novo* a district court's ruling regarding the scope of an arbitration clause. *CPR (USA) Inc. v. Spray*, 187 F.3d 245, 254 (2d Cir. 1999). It is familiar law that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1994) (Arbitration Act), expresses "a liberal federal policy favoring arbitration agreements" and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Arbitration is especially favored in resolving disputes involving international commerce, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), although the rationale of comity with foreign arbitral fora that undergirds this preference is not presently implicated, as the arbitration is set in New York. *Cf. Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 853 (2d Cir. 1987).

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While federal policy generally favors arbitration, the obligation to arbitrate nevertheless remains a creature of contract. Because arbitrators' authority arises only when the parties agree in advance to that forum, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

A. *Analysis of Arbitration Clause*

To determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a three-part inquiry. First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. *See Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000); *Peerless Imps., Inc. v. Wine, Liquor & Distillery Workers Union Local One*, 903 F.2d 924, 927 (2d Cir. 1990); *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that "is on its face within the purview of the clause," or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. *Rochdale Vill., Inc. v. Pub. Serv. Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979); *see also Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 64 (2d Cir. 1983). Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. *See Cornell Univ. v. UAW Local 2300*, 942 F.2d 138, 140 (2d Cir. 1991). Where the arbitration

clause is broad, "there arises a presumption of arbitrability" and arbitration of even a collateral matter will be ordered if the claim alleged "implicates issues of contract construction or the parties' rights and obligations under it." *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995).

The district court failed to classify the charter's arbitration clause before holding that the letters of indemnity, as collateral agreements, were still within the scope of the arbitration clause. In doing so, it relied upon our decision in *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997), which, in turn, purportedly relied upon our holding in *Collins*. *WorldCrisa*, while distinguishing broad arbitration clauses from narrow ones, extended the language of *Collins* beyond the meaning originally intended. We held in *Collins*:

> [I]f the arbitration clause is *broad*, there arises a presumption of arbitrability; if, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

*Collins*, 58 F.3d at 23 (emphasis added).

But in *WorldCrisa* we implied that this same test should apply to a *narrowly* worded arbitration clause, 129 F.3d at

74-75, despite precedent in which we consistently held that matters collateral to an agreement fall outside the scope of a narrow arbitration clause. *See, e.g., Peerless Imps.*, 903 F.2d at 927; *McDonnell Douglas Fin. Corp.*, 858 F.2d at 832; *Prudential Lines*, 704 F.2d at 63-64; *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 522 (2d Cir. 1980); *Rochdale Vill.*, 605 F.2d at 1295. Yet, because we explicitly held in *WorldCrisa* that the arbitration clause at issue was broad enough to justify a presumption of arbitrability, 129 F.3d at 75, its language regarding narrow arbitration clauses is *dicta*, which we are not obliged to extend to the case at hand. *See CFTC v. Dunn*, 58 F.3d 50, 53-54 (2d Cir. 1995) ("When a prior decision makes statements in a line of reasoning that are broader than necessary to the affirmance or reversal of a judgment, a later panel may confine the precedential effect to a narrower ground within the line of reasoning."), *rev'd on other grounds*, 519 U.S. 465 (1997).

We think making a distinction between broad and narrow arbitration clauses is necessary and sound, as the "scope of an arbitration clause, like any contract provision, is a question of the intent of the parties." *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 193 (2d Cir. 1984). When parties use expansive language in drafting an arbitration clause, presumably they intend all issues that "touch matters" within the main agreement to be arbitrated, *Genesco*, 815 F.2d at 846, while the intended scope of a narrow arbitration clause is obviously more limited.

B. *Clause 31 Is a Broad Arbitration Clause*

Appellant maintains that clause 31 is a narrow arbitration clause, but provides scant support for this contention.

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No fixed rules govern the determination of an arbitration clause's scope; while very expansive language will generally suggest a broad arbitration clause, *see, e.g.*, *Collins*, 58 F.3d at 18 ("Any claim or controversy arising out of or relating to this agreement shall be settled by arbitration."), we have also found broad clauses when examining phrasing slightly more limited, *see, e.g.*, *Abram Landau Real Estate v. Bevona*, 123 F.3d 69, 71 (2d Cir. 1997) ("Contract Arbitrator shall have the power to decide all differences arising between the parties to this agreement as to interpretation, application or performance of any part of this agreement."). In the end, a court must determine whether, on the one hand, the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause, or if, on the other hand, arbitration was designed to play a more limited role in any future dispute. *See Mitsubishi Motors Corp.*, 473 U.S. at 626 ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. . . . [A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

Clause 31 of the charter, although "not unlimited," *Rochdale Vill.*, 605 F.2d at 1296, is a broad clause. It mandates that "[a]ny dispute arising from the making, performance or termination of this Charter Party" be arbitrated. The clause contains two parts that bear upon the determination of its breadth, neither of which indicates that the parties intended to limit the scope of arbitration narrowly. The first part of the clause provides that it covers all disputes

"arising from" the charter. In *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961), an early decision dealing with the scope of arbitration clauses under the Arbitration Act, we intimated that the use of the phrase "arising under" an agreement, in an arbitration clause, indicated that the parties intended the clause be narrowly applied. We have, however, since limited this holding to its facts, declaring that absent further limitation, only the precise language in *Kinoshita* would evince a narrow clause. *S.A. Mineracao*, 745 F.2d at 194 (holding that language of "aris[ing] or occur[ring] under" the agreement did not indicate a narrow arbitration clause) (alterations in original). The parties in this case did not utilize such precise language. To the extent a distinction exists between the present language of "arising from" and *Kinoshita*'s language of "arising under," we believe the distinction is more than just a semantic one, and only the latter phrase limits arbitration to a literal interpretation or performance of the contract. *See Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993) (holding relevant language indicated a broader forum selection clause, and stating that "[w]e find no substantive difference in the present context between the phrases 'relating to,' 'in connection with' or '*arising from*' ") (emphasis added); *see also J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (holding that language of "arising in connection with" indicated a more expansive arbitration clause).

Neither does the language of the second part of clause 31, "the making, performance or termination of this Charter Party," suggest an intention by the parties to limit the scope of the clause. While declaring that the overall tone of the

arbitration clause controlled its scope, we held in *Prudential Lines* that "[s]pecific words or phrases alone may not be determinative although words of limitation would indicate a narrower clause." 704 F.2d at 64; *see also Cornell Univ.*, 942 F.2d at 140 (considering narrow arbitration clause that provided for arbitration of "any matter involving the interpretation or application of this Agreement which alleges a violation of the rights of an employee or the Union under the terms of this Agreement"); *McDonnell Douglas Fin. Corp.*, 858 F.2d at 832 (holding that clause providing for arbitration in the case of disagreement over "computation of the amount of the required indemnity payment or refund thereof" is narrow). Dreyfus believes that because clause 31 contains what is alleged to be language of limitation, arbitration is limited to disputes directly under the charter. We do not adopt that view.

The charter governed a single shipment of soyabean oil aboard the vessel M.T. THORSFREDDY. It is difficult to perceive how the language used, *i.e.*, "the making, performance or termination" of the charter could be construed as other than intending to cover all disputes connected to this lone voyage. *See Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1515 (10th Cir. 1995) (holding that language of "arising in connection with the implementation, interpretation or enforcement" of agreement was broad); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 850 F.2d 756, 760 (D.C. Cir. 1988) (holding that language of "[a]ny claim or controversy between [parties] concerning the interpretation, application or implementation" of agreement was broad) (first alteration in original); *Armada Coal Exp., Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1568 (11th

Cir. 1984) (parties admit that clause providing "[a]ny dispute arising during the execution of the Charter Party" is broad) (alteration in original).

The present language is sweeping, covering the full panoply of events, from the time of contracting ("making"), through execution under the terms of the charter ("performance"), until the eventual expiration of the agreement ("termination"). Contrary to appellant's argument, it is more likely these words were included to reflect the desire by the parties to ensure that the entire duration of the agreement be covered, especially since the issue of whether a clause covers an agreement's termination is a common source of litigation. *See, e.g.*, *Abram Landau Real Estate*, 123 F.3d at 73; *Rochdale Vill.*, 605 F.2d at 1296-97. We hold, accordingly, that clause 31 is a broad arbitration clause.

### C. *Part of Blystad's Claim Is Directly Under the Charter*

The next step in deciding whether Blystad's claim is arbitrable is to determine whether the claim arises directly under the charter party or is collateral to it. In its March 13, 1997 letter demanding arbitration, Blystad sought "compensation for the damages it has suffered directly, and an indemnity for any and all liability it has or may suffer to third parties, as a result of Dreyfus' breach." The claim for direct damages is brought under the agreement, but the claim for indemnification under the letters of indemnity is collateral to the arbitration agreement.

In Blystad's submissions to the district court, it pointed to a number of provisions of the charter — separate from the

letters of indemnity — under which it will seek relief before the arbitration panel. These include, *inter alia*: (1) Part I, clause D, governing discharge ports; (2) Part II, clauses 6(a)-(c), governing safe berths, shifting to other berths, liability for customs overtime and fees for shifting berths, and liability for costs upon a change of discharge ports; (3) Part II, clause 7, governing the pumping of cargo in and out of the vessel; (4) Part II, clause 12, governing expenses at loading and discharge ports; and (5) Part II, clause 24, providing for the charterer's obligation to indemnify the vessel owner for any liabilities resulting from "signing bills of lading or other documents inconsistent with this Charter or from any irregularity in papers supplied by the Charterer or its agents, or from complying with any orders of the Charterer or its agents." Blystad has also asserted that it may make a claim before the arbitrators for an indemnity by operation of law, *see, e.g.*, *Nissho-Iwai Co. v. M/T Stolt Lion*, 617 F.2d 907, 913-14 (2d Cir. 1980), based on the order to change discharge ports and to deliver the cargo without the original bills of lading.

Appellant raises two principal objections to these parts of Blystad's claim that are purportedly brought directly under the charter party. The first is the assertion that Dreyfus' alleged breach does not implicate the particular provisions of the agreement referenced by Blystad. This objection conflates the question of whether the dispute is within the scope of the arbitration clause with the potential merits of the claim. It is established that under a broad arbitration clause, a dispute under the contract must be arbitrated "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous." *AT&T Techs.*, 475 U.S. at 649-50;

*accord Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union, Local 812*, 39 F.3d 408, 410 (2d Cir. 1994). As the parties have contractually agreed that disputes brought directly under the charter should be arbitrated, it is not the task of a court to explore their merits.

The second objection to Blystad's claim under the charter provisions is Dreyfus' assertion that "performance" under the charter, as provided by the arbitration clause, was completed upon the original issuance of the bills of lading. Dreyfus insists that once the original bills of lading specified that delivery was to be to Qingdao, neither Blystad nor Dreyfus could unilaterally change the discharge port. Since the vessel could not be compelled to change discharge ports, any change in destination would have to be under a separate agreement — here, the letters of indemnity — and only this separate agreement would govern delivery to Qin Huang Dao, the newly designated port.

Dreyfus' argument does not follow logically. We see no reason to view "performance," as provided in clause 31, so narrowly as to encompass only the agreement to proceed to Qingdao, when the obvious purpose of the agreement was to transport soyabean oil from a port in the United States to a port in China. The fact that neither party could unilaterally change the discharge port after the issuance of the bills of lading does not suggest that performance was completed at the point of issuance. Rather, performance under the charter continued until the eventual discharge of the cargo at Qin Huang Dao, notwithstanding the letters of indemnity.

Absent evidence that the parties *intended* the letters should supersede the charter party, both agreements were in

effect at the conclusion of the voyage, with the former merely supplementing the latter. As Professor Corbin explained:

> It happens very frequently that a party to a valid contract attempts, either as plaintiff or as defendant, to show that a new contract has been substituted, either as a total discharge or as a partial modification and discharge. The existence of such a new contract of substitution or modification must be established in the same way as is any other contract. *No one will be held to have surrendered or modified any of his contract rights unless he is shown to have assented thereto* in a manner that satisfies the requirements of a valid contract.

6 Arthur Linton Corbin, *Corbin on Contracts* § 1293 (1962) (emphasis added).

While the letters of indemnity may constitute a fully executed contract, there is no indication that they were intended to supplant the charter party, rather than simply provide added protection for Blystad in return for agreeing to the change in discharge ports. In fact, clause 6(c) of the charter specifically envisioned such a change, directing that any change be in writing, and mandating that the "Charterer shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby." Accordingly, since the charter remained in effect through the voyage to Qin Huang Dao, any claim under that agreement is subject to arbitration.

*Appendix A*

D. *The Claim Under the Letters of Indemnity Is Within the Scope of the Arbitration Clause*

Blystad's claim for indemnification under the letters of indemnity is not brought directly under the charter agreement, but is made under a collateral agreement. We have explained that for purposes of arbitration, a collateral agreement is "a separate, side agreement, connected with the principal contract which contains the arbitration clause." *Prudential Lines*, 704 F.2d at 64. The letters were issued subsequent to the charter party and are not specifically incorporated or even referenced by that agreement. While clause 6(c) mandates that all changes in discharge ports be in writing, and provides for compensation for costs incident to this change, it does not explicitly provide for indemnification. Absent any reference by the charter party to the letters, or language indicating that the letters themselves incorporated the charter, these claims must be deemed collateral to the main agreement. *See Fairmont Shipping (H.K.), Ltd. v. Primary Indus. Corp.*, No. 86 Civ. 3668, 1988 WL 7805, at *4 (S.D.N.Y. Jan. 25, 1988) (finding letters of indemnity collateral to charter party), *aff'd*, 940 F.2d 649 (2d Cir. 1991) (table).

Accordingly, under *Collins*, we test the "presumption of arbitrability" associated with a broad arbitration clause by asking whether claims under letters of indemnity — as claims under a collateral agreement — "implicate[ ] issues of contract construction or the parties' rights and obligations under it." *Collins*, 58 F.3d at 23. This test is more expansive than the one we apply for a narrow arbitration clause, in which the claim must "on its face" be brought under the terms

of the agreement. *Rochdale Vill.*, 605 F.2d at 1295. The letters of indemnity clearly implicate at least two clauses of the charter: clause 6(c), providing for a writing and payment of costs upon a change in discharge ports; and clause 24, providing for indemnification for compliance with the orders of the charterer. By implicating the rights of Blystad and the duties of Dreyfus under the charter party, the letters of indemnity are within the scope of the broad arbitration clause.

II Blystad Did Not Waive Its Right to Arbitration

Dreyfus declares that even if Blystad's claim is within the scope of the charter's arbitration clause, Blystad waived its right to arbitrate by first bringing suit in London. We review *de novo* the issue of whether a party has waived its right to arbitration, but "[t]he rule preferring arbitration, when agreed upon, ha[s] led to its corollary that any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995).

We consider three factors in determining whether a party has waived its right to arbitration: (1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice. *Id.* None of these factors supports a finding that Blystad waived its right to arbitrate.

Blystad requested arbitration on March 13, 1997, just eight days after it commenced the London proceedings. This short period of delay, standing alone, certainly does not

support a finding of waiver. *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 108 (2d Cir. 1997) (five-month delay does not by itself infer waiver of arbitration). Nor has there been extensive litigation to date; so far the parties have simply appeared before the London High Court, submitted their "Points of Defence" to Blystad's claims, and interposed claims against each other. *Cf. Leadertex*, 67 F.3d at 26 (seven-month delay, during which defendant vigorously pursued discovery, "strongly implies [the party] forfeited its contractual right to compel arbitration").

Of most relevance, Dreyfus has failed to establish that it suffered prejudice as a result of Blystad first initiating proceedings in London. Dreyfus complains that it is exposed to the possibility of inconsistent verdicts by having to litigate in New York. Blystad was found liable to Thorsfreddy in a New York arbitration, and seeks indemnification from Dreyfus. Appellant in turn seeks indemnification from Lief, and Lief seeks indemnification from Kaland. Since Lief and Kaland were not parties to the charter party, they are not subject to the New York arbitration, but have appeared in the London proceeding under the letters of indemnity. Dreyfus' concern, should it be pulled out of the London litigation and forced to arbitrate in New York, is that it might not be able to pass on its liability to those parties ultimately responsible for the detention of the vessel.

This concern, however, is not the type of prejudice that supports a finding of waiver. As we held in *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997), "prejudice as defined by our cases refers to the inherent unfairness — in terms of delay, expense, or damage to a

party's legal position — that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." Prejudice does not refer to enforcing a bargained-for agreement, even where such enforcement will obligate a party to litigate in more than one forum. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 ("Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."). As a consequence, we conclude that Blystad has not waived its right to arbitrate its claim.

In sum, Dreyfus agreed to both the charter party and the letters of indemnity, and absent proof of some form of recognized prejudice, such as undue delay or expense, it may not now seek to avoid the requirements of the arbitration agreement simply because what it bargained for has come to pass.

## CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying appellant's motion to: (1) declare that Blystad's claim is not subject to litigation; (2) stay further proceedings in the New York arbitration; and (3) enforce the London choice of forum provision of the letters of indemnity.

Affirmed.

## APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 26, 2000

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**99 Civ. 11128 (SAS)**

**LOUIS DREYFUS NEGOCE S.A.,**

**Petitioner,**

**v.**

**BLYSTAD SHIPPING & TRADING, INC.,**

**Respondent.**

### OPINION AND ORDER

**SHIRA A. SCHEINDLIN, U.S.D.J.**

On February 29, 2000, this Court issued an Opinion and Order denying a motion by petitioner Louis Dreyfus Negoce S.A. ("Dreyfus") for an order: (1) declaring that the claim brought by respondent Blystad Shipping & Trading Inc. ("Blystad") against Dreyfus is not subject to arbitration in New York; (2) staying any further proceedings in the pending New York arbitration; and (3) enforcing a choice of law/ choice of forum provision stipulating that Blystad's claim must be brought in London. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, No. 99 Civ. 11128 (SAS),

2000 WL 235130 (S.D.N.Y. Feb. 29, 2000) (the "Opinion"). Dreyfus now moves this Court, pursuant to Rule 6.3 of the Local Civil Rules for the United States District Courts for the Southern and Eastern Districts of New York, for reconsideration of the Opinion. For the reasons set forth below, Dreyfus' motion for reconsideration is denied.

The Opinion discussed in detail the relevant facts and procedural history; familiarity with that discussion is assumed. *See* Opinion, 2000 WL 235130, at *1-*4. The legal standard for granting a motion for reconsideration is clear. "The standard for granting . . . a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Motions for reconsideration must be narrowly construed and strictly applied "to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court," "to ensure finality," and "to prevent the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters." *Range Road Music, Inc. v. Music Sales Corp.*, No. 97 Civ. 3098 (JES), 2000 WL 328524, at *1 (S.D.N.Y. Mar. 28, 2000) (quotation marks and citations omitted).

Dreyfus does not dispute the Court's finding that the letters of indemnity are collateral agreements to the Charter. *See* Opinion, 2000 WL 235130, at *6-*7. Rather, Dreyfus argues that this Court overlooked controlling precedents in

reaching the conclusion that Blystad's claims under the letters of indemnity, asserted before the London High Court, are subject to arbitration in New York because those claims "clearly touch matters covered by, and implicate the parties' rights and obligations under, the Charter." Opinion, 2000 WL 235130, at *10. According to Dreyfus, two recent Second Circuit opinions have emphasized the importance of deciding whether a particular dispute is subject to arbitration in accordance with the intent of the parties, a principle allegedly overlooked by this Court.

The first case cited by Dreyfus — *Forbes v. Cendant Corporation*, No. 99-9180, 2000 WL 232069 (2d Cir. Jan. 28, 2000) — is an unpublished disposition. Because unpublished dispositions "do not constitute formal opinions" of the Second Circuit, they cannot "be cited or otherwise used in unrelated cases before this or any other court." United States Court of Appeals for the Second Circuit, Rules Relating to the Organization of the Court, § 0.23; *see Crocco v. Xerox Corp.*, 137 F.3d 105, 108 n.4 (2d Cir. 1998) (noting that appellants' reference to an unpublished summary order was "entirely improper"); *Rizzo-Puccio v. College Auxiliary Services, Inc.*, 71 F. Supp. 2d 47, 60 n.4 (S.D.N.Y. 1999) (admonishing party that cited to an unpublished Second Circuit opinion "to abide by Second Circuit rules in the future"); *Schreter v. Bednosky*, 963 F. Supp. 216, 218 n.1 (E.D.N.Y. 1997) (noting that court did not rely on defendants' citation to unpublished Second Circuit summary order).

The second case cited by Dreyfus — *Mehler v. The Terminix International Company*, 205 F.3d 44 (2d Cir.

2000) — is a published disposition, but it does not warrant reconsideration of the Opinion. In *Mehler*, the Second Circuit first held that an oral agreement for termite extermination services and a subsequent written agreement constituted a unified contract. *See Mehler*, 205 F.3d at 47-49. The Court then concluded that Mehler's claims, ostensibly for breach of the oral agreement, were covered by the broad arbitration clause contained in the written agreement. *See id.* at 50. Dreyfus argues that *Mehler* applied state-law contract principles "in deciding whether the parties agreed to arbitrate a certain matter." *Id.* at 48. But *Mehler* applied those principles in determining whether the oral agreement and the written agreement constituted a unified contract. *See id.* at 47-49. After that step was complete, *Mehler* then employed the same doctrine applied by this Court in determining whether the claims ostensibly brought under the oral agreement related to the written agreement, thereby making those claims arbitrable. *See id.* at 50 (citing *Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16, 21 (2d Cir. 1995)); Opinion, 2000 WL 235130, at *7-*10 (citing same).

In its reply brief, Dreyfus argues that this Court erred in applying the *Collins* test to the allegedly narrow arbitration clause at issue in this case. Conceding that this Court relied on *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71 (2d Cir. 1997), which "does indeed state that the reach of a 'narrow' arbitration clause is tested by the 'touch matters' standard elucidated in *Collins*," Dreyfus argues that "a careful reading of *Collins* demonstrates that *WorldCrisa* misconstrued *Collins* [which involved a broad arbitration clause] and that this error has misled this Court." Petitioner's Reply

*Appendix B*

Memorandum in Further Support of Motion for Reconsideration, at 5. This Court is bound by *WorldCrisa*; Dreyfus must direct its argument to the appellate court. *See Dodds v. Cigna Securities*, 12 F.3d 346, 353 (2d Cir. 1993) (noting that "[o]nly an in banc court or an intervening Supreme Court decision can overrule" a Second Circuit opinion); *see also Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311, 317 n.3 (N.D.N.Y. 1997) ("[T]his Court is not afforded the luxury of choosing at its leisure which of the Second Circuit's decisions it will follow and which not."), *aff'd*, 162 F.3d 1148 (2d Cir. 1998).

Essentially, Dreyfus argues that this Court ignored the parties' clear intent that disputes arising under the letters of indemnity be resolved in the London High Court, not in a New York arbitration. At the beginning of its analysis, however, the Opinion notes that arbitration agreements should be construed like contracts, because "federal law does not require parties to arbitrate when they have not agreed to do so." Opinion, 2000 WL 235130, at *5 (quotation marks and citation omitted). After examining the relevant language of both the Charter and the letters of indemnity, the Opinion then states: "The letters of indemnity indemnified Blystad against any claims resulting from the delivery of the goods to Qin Huang Dao; they did not erase Dreyfus' obligation to properly perform its responsibilities under the Charter itself, including the responsibilities asserted by Blystad in the arbitration." *Id.*, at *9. The Court did not overlook the intent of the parties; indeed, the Court has little doubt of the parties' intent that claims arising solely under the letters of indemnity be heard in the London High Court. As the Opinion explained, however, the problem is that "Blystad's asserted

claims under the letters of indemnity clearly touch matters covered by, and implicate the parties' rights and obligations under, the Charter." *Id.*, at *10. Under established Second Circuit doctrine, those claims must be arbitrated.[1]

Dreyfus also identifies factual matters that, in its view, were not considered by the Court. Most of this argument falls into the category of "repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music*, 2000 WL 382524, at *1. (quotation marks and citations omitted). Dreyfus does note that Blystad may have claims under the letters of indemnity against Lief, the party that intended to purchase the soyabean oil from Dreyfus, that would be brought in the London High Court, raising the prospect of duplicative proceedings and inconsistent results. But this danger is outweighed by the fact that a court should "compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Collins*, 58 F.3d at 19 (quotation marks and citations omitted). Blystad and Dreyfus, unlike Blystad and Lief, are parties to an agreement other than the letters of indemnity — the Charter. Because Blystad's claims under the letters of indemnity touch matters covered by the Charter, which contains an arbitration clause, Blystad's claims against Dreyfus are arbitrable.[2]

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1. As noted in the Opinion, "I express no opinion as to whether Blystad could assert any claims under the letters of indemnity that do not touch matters covered by the Charter." Opinion, 2000 WL 235130, at *10 n.7.

2. Blystad does point out one error in the Opinion. In the discussion of whether Blystad had waived the right to arbitration, (Cont'd)

For all of the reasons stated above, Dreyfus' motion for reconsideration is denied.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
April 26, 2000

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(Cont'd)
one paragraph begins with the sentence: "Blystad has not waived its right to demand arbitration." Opinion, 2000 WL 235130, at *11. The fourth sentence of that paragraph should be amended as follows: "Third, Dreyfus has not demonstrated any prejudice as a result of the London proceeding." This change simply replaces "Blystad" with "Dreyfus."

## APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 29, 2000

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**99 Civ. 11128 (SAS)**

**LOUIS DREYFUS NEGOCE S.A.,**

**Petitioner,**

**v.**

**BLYSTAD SHIPPING & TRADING, INC.,**

**Respondent.**

### OPINION AND ORDER

**SHIRA A. SCHEINDLIN, U.S.D.J.**

Petitioner Louis Dreyfus Negoce S.A. ("Dreyfus") moves this Court, pursuant to the United States Arbitration Act, 9 U.S.C. § 1 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201, for an order: (1) declaring that the claim brought by respondent Blystad Shipping & Trading Inc. ("Blystad") against Dreyfus is not subject to arbitration in New York; (2) staying any further proceedings in the pending New York arbitration; and (3) enforcing a choice of law/ choice of forum provision stipulating that Blystad's claim must be brought in London. For the reasons set forth below, Dreyfus' motion is denied.

*Appendix C*

## I. BACKGROUND

### A. Facts

On November 27, 1996, Blystad and Dreyfus entered into a tanker voyage charter party (the "Charter"), providing for the carriage of a shipment of crude degummed soyabean oil from the United States to China. *See* Affidavit of Clifford A. Dahl, Assistant Chartering Manager at Dreyfus ("Dahl Aff."), ¶ 2. Blystad was the time charterer of a vessel known as the M.T. THORSFREDDY (the "Vessel"), owned by Jahre Dahl Bergesen ("Bergesen"). *See id.*; Affidavit of David Nourse, counsel for Dreyfus ("Nourse Aff."), Ex. C. Dreyfus intended to sell the soyabean oil to Lief Enterprise Pty Ltd. ("Lief"), which intended to sell it to Kaland Limited ("Kaland"). *See* Nourse Aff., ¶¶ 2, 11.

The Charter provided that the Vessel would pick up the soyabean oil at Brownsville, Texas, and New Orleans, Louisiana, and discharge it at "One (1) safe berth each/One (1)/Two (2) safe port(s) CHINA;" the Charter did not specify the discharge port in China. *See* Dahl Aff., Ex. B, Cl. C. In December 1996, the soyabean oil was loaded onto the Vessel at Brownsville and New Orleans. *See* Dahl Aff., ¶¶ 8, 9; Nourse Aff., ¶ 4. Pursuant to instructions received from Lief, tanker bills of lading providing that the soyabean oil should be discharged at Qingdao, China, were issued. *See* Nourse Aff., ¶ 4; Dahl Aff., ¶ 9, Exs. C, D.

On or about January 13, 1997, as the Vessel was approaching China, Blystad advised that the Vessel was expected to arrive at Qingdao on January 18, but that the

original bills of lading had not yet arrived. *See* Nourse Aff., ¶ 5; Dahl Aff., ¶ 12. Blystad requested that Dreyfus arrange for a letter of indemnity from the receivers of the soyabean oil, so that the Vessel might discharge the soyabean oil on its arrival in Qingdao without waiting for presentation of bills of lading. *See id.* Blystad provided Dreyfus with a form letter of indemnity; Dreyfus forwarded this form letter to Lief. *See* Nourse Aff., ¶ 5; Dahl Aff., ¶ 13.

On or about January 15, 1997, Lief advised Dreyfus that Kaland, the ultimate buyer, had requested that the discharging port be changed to Qin Huang Dao, China. *See* Nourse Aff., ¶ 6; Dahl Aff., ¶ 13. The Charter contained a provision specifically related to a change in the discharge port; that provision states, in relevant part:

> [T]he Charterer warrants that the cargo shall be discharged at the ports and berths specified in Part I. Any change in loading or discharging ports or berths shall be made only as the result of special agreement in writing between Charterer and Owner, and in such case, Charterer shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby.

Dahl Aff., Ex. B, Cl. 6(c). Dreyfus relayed Kaland's request to Blystad and indicated that letters of indemnity regarding the change of destination and the discharge of cargo without the presentation of the original bills of lading would be issued by both Lief and Dreyfus. *See* Nourse Aff., ¶ 6; Dahl Aff., ¶ 13. Blystad advised Dreyfus that the Vessel's expected

arrival date in Qin Huang Dao was January 18 and requested that the letters of indemnity be forwarded. *See* Nourse Aff., ¶ 6; Dahl Aff., ¶ 13.

On or about January 20, 1997, Dreyfus received two letters of indemnity from Lief. *See* Nourse Aff., ¶ 7; Dahl Aff., ¶ 16. These letters of indemnity were typed on Lief's letterhead, signed on its behalf, and dated January 17 and 20, 1997; they were in the form provided by Blystad and were addressed to Blystad, as "owners," and Dreyfus, as "charterers." *See* Nourse Aff., ¶ 7; Dahl Aff., ¶ 16, Ex. K. Dreyfus endorsed both letters of indemnity by adding its name, address, and signature on the second page of each letter and then superimposing a copy of the text of the letters, thus endorsed, upon Dreyfus' letterhead. *See* Nourse Aff., ¶ 8; Dahl Aff., ¶ 17, Ex. L. Dreyfus then forwarded these endorsed letters of indemnity to Blystad, which confirmed that the letters were in order and that the Vessel had been instructed to discharge the soyabean oil without delay. *See* Nourse Aff., ¶ 8; Dahl Aff., ¶ 18.

The letters of indemnity state, in relevant part:

> In consideration of your complying with our above request we hereby agree as follows:
>
> 1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss or damage of whatsoever nature which you may sustain by reason of delivering the goods to China Ocean Shipping Agency, Qin Huang Dao in accordance with our request.

*Appendix C*

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the goods as aforesaid, to provide you or them from time to time with sufficient funds to defend the same.

3. If the vessel or any other vessel or property belonging to you should be arrested or detained or if the arrest or detention thereof should be threatened, [in connection with the delivery of the goods as aforesaid,] to provide such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and to indemnify you in respect of any loss, damage or expenses caused by such arrest or detention whether or not the same may be justified.

4. As soon as all original Bills of Lading for the above goods shall have arrived and/or come into our possession, to produce and deliver the same to you [or to your agents at Port of Discharge] whereupon our liability hereunder shall cease [immediately].

5. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to, or liable under, this indemnity.

> 6. This indemnity shall be construed in accordance with English Law and each and every person liable under this indemnity shall, at your request, submit to the jurisdiction of the High Court of Justice of England.

Dahl Aff., Exs. K, L.[1]

After discharging the soyabean oil at Qin Huang Dao, the Vessel was arrested by order of the Tianjin Maritime Court. *See* Nourse Aff., ¶ 9. The Vessel remained under arrest for about three months. *See id.* Following its release, the Vessel discharged a second parcel of soyabean oil at Shantou, China, and then left China. *See id.*

**B. Procedural History**

On March 5, 1997, Blystad commenced an action against Dreyfus and Lief in the High Court of Justice, Queens Bench Division, Commercial Court, in London (the "London High Court"). *See* Nourse Aff., ¶ 10; Unsworn Declaration Under Penalty of Perjury of Stephen Kirkpatrick, counsel for Dreyfus in London ("Kirkpatrick Decl."), ¶ 2. In its Writ of Summons, Blystad described its claim as follows:

> The Plaintiffs' claim is for damages for breach of a contract contained in and/or evidenced by a letter from the Defendants to the Plaintiff dated

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1. Exhibit K is the letter of indemnity dated January 17, 1997; Exhibit L is the letter of indemnity dated January 20, 1997. The bracketed portions appear only in Exhibit L.

> 20th January 1997 in failing to provide such bail or security required to prevent the arrest of, and/or secure the release from arrest of, the vessel "THORSFREDDY" at Qing [sic] Huang Dao, China, in January 1997, and/or for an indemnity pursuant to the terms of the contract in respect of liability, loss and damage suffered by the Plaintiffs as a result of the arrest of the vessel and/or as a result of the Plaintiffs complying with the Defendants' request for the vessel to proceed to Qin Huang Dao (instead of Qingdao) and/or the Defendants' request for cargo to be delivered to Chua [sic] Ocean Shipping Agency, and/or for specific performance of the contract.

Kirkpatrick Decl., Ex. A.

Little more than a week later, on March 13, 1997, Blystad sent Dreyfus a letter demanding "arbitration of Blystad's claims for breach of charter in connection with the discharge of a cargo of soyabean oil at Qin Huang Dao, China," pursuant to the arbitration clause contained in the Charter. *See* Nourse Aff., ¶ 12, Ex. A. The Charter's arbitration clause states:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall

> be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

Dahl Aff., Ex. B, Cl. 31. The dispute between Dreyfus and Blystad then proceeded along the parallel tracks of litigation in London and arbitration in New York.

On or about March 18, 1997, Dreyfus appeared in the London High Court to defend Blystad's claim; Lief appeared on April 18, 1997. *See* Kirkpatrick Decl., ¶ 3. On April 18, 1997, Blystad served its Points of Claim against both Dreyfus and Lief. *See id.* ¶ 4.[2] In late May 1997, both Dreyfus and Lief served their Points of Defence against Blystad; Dreyfus also filed an indemnity claim against Lief. *See id.*, ¶¶ 5-7; Nourse Aff., ¶ 11. On or about June 20, 1997, Blystad served Voluntary Particulars on Dreyfus and Lief. *See* Kirkpatrick Decl., ¶ 8. On or about July 15, 1997, Lief filed an indemnity claim against Kaland, which appeared to defend the claim on August 1, 1997. *See id.*, ¶ 9; Nourse Aff., ¶ 11. The London High Court action is still pending. *See* Kirkpatrick Decl., ¶ 10; Nourse Aff., ¶ 11.

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2. On or about June 11, 1997, Blystad served an amended copy of its Points of Claim on Dreyfus and Blystad, adding a claim based upon the letter of indemnity dated January 17, 1997. *See* Kirkpatrick Decl., ¶ 4.

Back in New York, Blystad renewed its demand for arbitration on November 18, 1997. *See* Nourse Aff., ¶ 13. On December 8, 1997, Dreyfus responded to Blystad's renewed demand, appointing an arbitrator but stating that the appointment was "without prejudice to Dreyfus' position that the issues which Blystad seeks to arbitrate in New York may be subject to the litigation which Blystad has commenced" in the London High Court. *See id.*, ¶ 14. There have not been any proceedings in the New York arbitration. *See id.*, ¶ 15; Affidavit of Simon Harter, counsel for Blystad ("Harter Aff."), ¶ 8.

Finally, on November 5, 1999, Dreyfus moved this Court for an order: (1) declaring that Blystad's claim for indemnity against Dreyfus is not subject to arbitration in New York; (2) staying the arbitration between Dreyfus and Blystad in New York; and (3) enforcing the choice of law/choice of forum clause contained in the letters of indemnity. Blystad opposes this motion, arguing that its claim against Dreyfus is subject to arbitration in New York.[3]

## II. DISCUSSION

The parties agree that the Charter contains a valid arbitration clause. Their disagreement involves the scope of that clause and, more specifically, whether the clause applies to the claims asserted by Blystad. The Second Circuit Court of Appeals has laid out some general principles for determining the scope of an arbitration clause:

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3. Although Blystad requested oral argument or an evidentiary hearing, these appear to be unnecessary, given the thorough briefing and the arguments at the pre-motion conference and at a subsequent telephone conference.

*Appendix C*

> Federal arbitration policy respects arbitration agreements as contracts that are enforceable in the same way as any other contract. . . . Federal policy strongly favors arbitration as an alternative dispute resolution process. We are instructed that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Accordingly, federal policy requires us to construe arbitration clauses as broadly as possible. We will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.
>
> These are rules of construction, however, and what we construe is a contract. Accordingly, federal law does not require parties to arbitrate when they have not agreed to do so. Federal law simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

*Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16, 19-20 (2d Cir. 1995) (quotation marks and citations omitted).

In addition to these general principles, the Second Circuit has provided a roadmap for analyzing whether Blystad's claims are arbitrable. First, "a court should decide at the outset whether the arbitration agreement is broad or narrow." *Id.* at 20 (quotation marks and citation omitted).

> [I]f the arbitration clause is broad, there arises a presumption of arbitrability; if, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties' rights and obligations under it. If the answer is yes, then the collateral dispute falls within the scope of the arbitration agreement; claims that present no question involving construction of the contract, and no questions in respect of the parties' rights and obligations under it, are beyond the scope of the arbitration agreement.

*Id.* at 23. A court should apply the same test "[i]f an arbitration clause is narrowly worded and the dispute concerns a matter collateral to the contract calling for arbitration." *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74-75 (2d Cir. 1997).

**A. Is the Charter's Arbitration Clause Broad or Narrow?**

The Charter's arbitration clause covers "[a]ny dispute arising from the making, performance or termination" of the Charter. *See* Dahl Aff., Ex. B, Cl. 31. Dreyfus argues that the clause is narrow; Blystad contends that it is broad. The Second Circuit has explained that, in determining whether an arbitration clause is broad or narrow, "[s]pecific words or phrases alone may not be determinative although words

of limitation would indicate a narrower clause. The tone of the clause as a whole must be considered." *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 64 (2d Cir. 1983); *see also McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988) ("In construing arbitration clauses, courts have at times distinguished between 'broad' clauses that purport to refer all disputes arising out of a contract to arbitration and 'narrow' clauses that limit arbitration to specific types of disputes.").

The best approach in this case is the one taken by the Second Circuit in *WorldCrisa*, where it explained:

> The arbitration clause at issue here does not contain the typically broad language that makes arbitrable all disputes 'arising out of' or 'related to' the contract or its breach. On the other hand, the clause is by no means narrow. It is not necessary to make the nice determination of exactly where in the range between broad and narrow this clause fits. The clause is close enough to the 'broad' end of the spectrum to justify a presumption of arbitrability here. Moreover, we believe that even without resort to the presumption the current dispute falls within the scope of the arbitration clause.

*WorldCrisa Corp.*, 129 F.3d at 75; *see also Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1296 (2d Cir. 1979) ("The arbitration clause in the collective bargaining agreement between Rochdale and the Union is broad, but it is not unlimited."); *Cleveland Wrecking Co. v.*

*Iron Workers Local Union*, 947 F. Supp. 745, 748 (S.D.N.Y. 1996) (stating that arbitration clause at issue was "broad, but not unlimited"). As demonstrated below, it is not necessary to state unequivocally whether the Charter's arbitration clause is broad or narrow, because Blystad's claims fall within the scope of that clause, even without the presumption of arbitrability.

### B. Do Blystad's Claims Arise Under a Collateral Agreement?

Next, the Court must determine whether Blystad's claims arise under the Charter itself or under a collateral agreement. This determination involves two steps: (1) whether the letters of indemnity are collateral agreements to the Charter; and (2) whether Blystad's claims arise under the Charter or under the letters of indemnity.

#### 1. Are the letters of indemnity collateral agreements to the Charter?

The Second Circuit has explained the relevant inquiry:

> A 'collateral' agreement is a separate, side agreement, connected with the principal contract which contains the arbitration clause. The burden is on the party resisting arbitration to demonstrate that the disputed issue is collateral.
>
> If a dispute arises under a collateral agreement, arbitration of that dispute cannot be compelled merely based upon the existence of an arbitration clause in the main agreement.

*Appendix C*

> It is important to note the difference between a dispute arising under a collateral agreement and one which arises under the main agreement but requires determination of a sub-issue. The latter . . . is one which is inextricably tied up with the merits of the underlying dispute, . . . and is arbitrable.

*Prudential Lines*, 704 F.2d at 64 (quotation marks and citation omitted). Dreyfus argues that the letters of indemnity are collateral agreements, while Blystad contends that they are inextricably tied up with issues raised by the Charter.

In *Fairmont Shipping (H.K.), Ltd. v. Primary Industries Corp.*, No. 86 Civ. 3668 (SWK), 1988 WL 7805 (S.D.N.Y. Jan. 25, 1988), *aff'd*, 940 F.2d 649 (2d Cir. 1991), Judge Kram ruled that a letter of indemnity was a collateral agreement to a charter party, because "[t]he charter party nowhere references the letter of indemnity, nor does it require that a letter of indemnity be issued." *Id.* at *4. The court then explained that "[t]he present dispute [arising under the letter of indemnity] is not a 'sub-issue' of a dispute arising under the charter party, but is instead a separate agreement, merely connected to the charter party by reference." *Id.*; *see also United Philippine Lines, Inc. v. Metalsrussia Corp.*, No. 96 Civ. 8868 (MBM), 1997 WL 214959, at *3 (S.D.N.Y. Apr. 24, 1997) (parties conceded that the letter of indemnity was "an agreement separate from the charter party"); *but see Metal Transport Corp. v. Compania National Naviera, S.A.*, 268 F. Supp. 456, 458 (S.D.N.Y. 1965) ("While the Charter Party makes no direct reference to the addendum or to the letter of indemnity, they were an integral part of it and were intended to change the printed terms, conditions and exceptions.").

*Appendix C*

Although *Fairmont Shipping* differs in some respects from this case — most notably because the letter of indemnity and charter at issue there involved different parties — its reasoning nevertheless applies here.[4] The letters of indemnity at issue here did not "explicitly incorporate [the Charter] or any of its terms" and they were written after the Charter "had been negotiated and signed." 1988 WL 7805, at *4. In addition, the Charter does not "reference[ ] [a] letter of indemnity, nor does it require that a letter of indemnity be issued." *Id.* Although Blystad argues that the Charter does reference a letter of indemnity, the clause identified by Blystad states that "[a]ny change in loading or discharging ports or berths shall be made only as the result of *special agreement in writing* between Charterer and Owner." Dahl Aff., Ex. B, Cl. 6(c) (emphasis added). Blystad also argues that the letters of indemnity are inextricably interrelated to the Charter, citing two cases in which courts ruled that, because a subsequent agreement merely supplemented an original agreement, the arbitration clause contained in the original agreement applied to the subsequent agreement. *See S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.*, 745 F.2d 190, 195 (2d Cir. 1984); *Vittoria Corp. v. New York Hotel and Motel Trades Council*, 30 F. Supp. 2d 431, 436-37 (S.D.N.Y. 1998). In this case, however, the letters of indemnity did not supplement or

4. Although Blystad argues that *Fairmont Shipping* is inapposite, it cites an earlier opinion in that case. *See* Memorandum of Respondent in Opposition to Motion to Stay Arbitration and Enforce English Forum Selection Clause ("Opp. Mem.") at 12-13 (citing *Fairmont Shipping (H.K.) Ltd. v. Primary Industries*, No. 86 Civ. 3668 (SWK), 1987 WL 9433 (S.D.N.Y. Apr. 7, 1987) (ordering evidentiary hearing)).

restate the Charter. Consequently, the letters of indemnity are "separate, side agreement[s]," *see Prudential Lines*, 704 F.2d at 64, that are collateral agreements to the Charter.

**2. Do Blystad's claims arise under the Charter or the letters of indemnity?**

Having determined that the letters of indemnity are collateral agreements to the Charter, the Court now must determine under which document Blystad's claims against Dreyfus arise. This question is complicated by the fact that Blystad has asserted claims under both the Charter and the letters of indemnity. In its demand for arbitration, Blystad stated that its claims were "for breach of charter in connection with a discharge of a cargo of soyabean oil at Qin Huang Dao, China" and that those claims "include, without limitation, compensation for the damages it has suffered directly, and an indemnity for any and all liability it has or may suffer to third parties, as a result of Dreyfus' breach." *See* Nourse Aff., Ex. A. In addition, Blystad's Memorandum of Law identifies a number of Charter provisions under which it could state claims against Dreyfus. *See* Opp. Mem. at 19-20. On the other hand, Blystad's claim in the London proceeding is limited to a claim under the letters of indemnity. *See* Kirkpatrick Decl., Ex. A. (describing claim as "breach of a contract contained in and/or evidenced by" the letters of indemnity).

To determine whether Blystad's claims arise under the Charter — and therefore are arbitrable — the Court must "review[ ] the allegations underlying the dispute and [ask] whether the claim alleged implicates issues of contract

construction or the parties' rights and obligations under it." *Collins & Aikman*, 58 F.3d at 23. Put another way:

> In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' [agreement containing an arbitration clause], then those claims must be arbitrated, whatever the legal labels attached to them.

*Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985)); *see also WorldCrisa Corp.*, 129 F.3d at 74-75 (applying both *Collins & Aikman* and *Genesco* standards to determine whether a particular claim fell within the scope of an arbitration clause). Accordingly, the Court will look beyond the legal labels attached to Blystad's claims in order to determine whether they arise under the Charter.

Blystad has identified a number of Charter provisions under which it alleges that its claims arise. *See* Opp. Mem. at 19-20. Many of these clauses have no counterpart in the letters of indemnity, as illustrated by these three examples:

> 7. PUMPING IN AND OUT. HOSES. (a) The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the

Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or consignee. The Vessel shall furnish her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel.

(h) Unless notation or exception is made in writing on the bill of lading, or other shipping document before departure of the Vessel from the dock or place at which the said cargo is delivered, receipt of the cargo shall be deemed prima facie evidence of right delivery of the entire cargo as described in the bill of lading; further, that upon failure or refusal by the Charterer or its representative to execute or except to the ullage reports prepared by the Vessel, the figures stated in said ullage reports shall be deemed prima facie correct and binding upon the parties hereto.

12. DUES, WHARFAGE, TAXES. The vessel shall be free of any wharfage, dockage, quay dues

or similar charges at all loading and discharging ports. Entrance and clearance fees whether measured by the volume of cargo or not, towing and tag charges, pilotage, dues, and other usual port charges on the Vessel shall be paid by the Owner. All other dues, taxes, assessments, and charges on the cargo shall be paid by the Charterer including but not without limitation any habilitation tax, Customs overtime, taxes on freight at loading or discharging ports as well as any unusual taxes, assessments or governmental charges whether in effect at present or whether imposed on the Vessel or freight in the future and whether or not measured by the volume of the cargo, shall be paid by the Charterer.

24. BILLS OF LADING. Bills of Lading in the form appearing below for cargo shipped shall be signed by the Master or Agent as requested. Any bill of lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter and shall be subject to all such terms, conditions and exceptions. The Charterer shall indemnify the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents or the Master or Vessel's agents signing bills of lading or other documents inconsistent with this Charter or from any irregularity in papers supplied by the Charterer or its agents, or from complying with any orders of the Charterer or its agents.

Dahl Aff., Ex. B; *see* Opp. Mem. at 19-20. At this stage in the proceedings, I have no basis to conclude that the claims asserted by Blystad in the arbitration do *not* arise under the Charter provisions. Because these claims arise under the Charter, they are arbitrable. *See* Dahl Aff., Ex. B, Cl. 31 (requiring arbitration of "[a]ny dispute arising from the making, performance or termination of this Charter Party").

Dreyfus does not contest the specific relevance of each of the Charter provisions cited by Blystad. Rather, Dreyfus argues that Blystad's claims cannot arise under the Charter because the bills of lading fixed the place for delivery of the soyabean oil — and therefore for performance of the Charter — as Qingdao. According to Dreyfus, any claims stemming from the delivery of the soyabean oil at Qin Huang Dao, rather than Qingdao, must arise under the letters of indemnity.[5]

Dreyfus' argument fails because the Charter explicitly contemplates a change in the port of delivery, without any mention that such a change will result in the termination of

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5. According to Blystad, Dreyfus has argued in the London High Court that Blystad's claims do not arise under the letters of indemnity. Blystad contends that, by adopting opposing positions before this Court and the London High Court, Dreyfus hopes to evade liability entirely. Dreyfus denies that it has taken an opposing position in the London High Court and that it seeks to evade liability in that manner. *See* Transcript of Feb. 24, 2000 Telephone Conference, at 8. Moreover, Blystad itself argued, in an arbitration hearing with Bergesen, the Vessel's owner, that the English jurisdictional clause in the letters of indemnity at issue in this case trumped a New York arbitration clause contained in Blystad's charter with Bergesen. *See* Nourse Aff., Ex. C, at 8-14.

the Charter. *See* Dahl Aff., Ex. B, Cl. 6(c) ("Any change in loading or discharging ports or berths shall be made only as the result of special agreement in writing between Charterer and Owner" and that "Charterer shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby."). The letters of indemnity indemnified Blystad against any claims resulting from the delivery of the goods to Qin Huang Dao; they did not erase Dreyfus' obligation to properly perform its responsibilities under the Charter itself, including the responsibilities asserted by Blystad in the arbitration. In addition, Dreyfus admits that the letters of indemnity are not novations that completely replaced the Charter. *See* Reply Memorandum of Petitioner, Louis Dreyfus Negoce S.A. ("Reply Mem."), at 6 ("There is no issue of novation presented because Dreyfus does not argue that the Charter was completely displaced or 'extinguished' by the letters of indemnity.").[6]

Because Blystad has asserted claims under the Charter, Dreyfus' request for a stay of the New York arbitration must be denied. But Blystad also has asserted claims under the letters of indemnity. The next question, then, is whether those claims also are subject to arbitration, even though Blystad has asserted them in the London High Court, because they implicate the parties' rights and obligations under, or touch

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6. Indeed, Dreyfus recognizes that Blystad still can bring claims under the Charter, noting in its reply brief that "when Blystad submitted a claim for demurrage following the vessel's departure from China, based upon the time spent discharging the cargo at Qin Huang Dao and Shantou, that claim was based upon the Charter's provisions for calculation of laytime and demurrage and was settled and paid by Dreyfus." Reply Mem. at 6.

matters covered by, the Charter. *See Collins & Aikman*, 58 F.3d at 23; *Genesco*, 815 F.2d at 846; *see also Fluor Daniel Intercontinental, Inc. v. General Electric Co.*, No. 98 Civ. 7181 (WHP), 1999 WL 637236, at *8 (S.D.N.Y. Aug. 20, 1999) ("The phrase 'touch matters' has been interpreted to mean 'arising in connection with.' ") (citation omitted).

In the London High Court, Blystad seeks "an indemnity . . . in respect of liability, loss and damage" suffered as a result of the arrest of the Vessel and Blystad's compliance with Dreyfus' request that the soyabean oil be delivered at Qin Huang Dao. *See* Kirkpatrick Decl., Ex. A. At a minimum, that claim implicates Clause 6(c) of the Charter, which provides that, in case of any change in discharging port, "Charterer shall assume all cost incident to such change, including the value of the vessel's time if the voyage is prolonged thereby." Dahl Aff., Ex. B, Cl. 6(c). In addition, several of Blystad's claims under the Charter overlap significantly with its claims under the letters of indemnity. *See* pp. 16-18 *supra.* For example, Blystad claims that it will assert, in the arbitration proceeding, "claims for an indemnity arising by operation of law as a result of its following Dreyfus' orders to change the discharge port and to deliver the cargo without presentation of original bills of lading." Opp. Mem. at 20.

Blystad's asserted claims under the letters of indemnity clearly touch matters covered by, and implicate the parties' rights and obligations under, the Charter. *See WorldCrisa Corp.*, 129 F.3d at 75 ("The complaint in the Connecticut Action relies on Armstrong's alleged failure to satisfy his obligations . . . under the Agreement. Armstrong has a right

to have issues related to that claim decided in the pending arbitration."); *see also Doctor's Associates, Inc. v. Quinn*, 42 F. Supp. 2d 184, 187 (D. Conn. 1999) ("[I]t is hard to see how a court could . . . forego any consideration of defendant's role as development agent and his duties outlined in the DA Agreement [which contained an arbitration clause] in resolving the dispute over the oral agreement [which did not]."), *aff'd*, No. 99-7344, 1999 WL 1254513 (2d Cir. Dec. 9, 1999). Mindful of the Second Circuit's guidance that a court should "compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," *Collins & Aikman*, 58 F.3d at 19 (quotation marks and citations omitted), I conclude that all of Blystad's claims against Dreyfus must be heard in the New York arbitration. *See Kerr-McGee Refining Corp. v. M/T Triumph*, 924 F.2d 467, 470 (2d Cir. 1991) (RICO claim fell within scope of charter party's arbitration clause because "[o]nce the parties have agreed to arbitrate disputes arising under an agreement — here the Charter — the arbitrators should be able to consider any conduct of the parties that bears on the damages appropriate for a covered dispute.").[7]

### C. Has Blystad waived the right to demand arbitration?

Finally, although Dreyfus does not argue explicitly that Blystad has waived its right to demand arbitration by filing

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7. I express no opinion as to whether Blystad could assert any claims under the letters of indemnity that do not touch matters covered by the Charter. In this case, however, all of the claims asserted by Blystad in the London High Court meet that standard.

a claim in London, Dreyfus does refer repeatedly to the London proceeding. Accordingly, I will briefly address the question of waiver. "Federal policy strongly favors arbitration as an alternative means of dispute resolution. . . . This preference for arbitration has led to its corollary that any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *PPG Industries, Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 107 (2d Cir. 1997) (quotation marks and citations omitted).

The Second Circuit has developed a clear standard for determining when a party has waived its right to arbitration. "[A] party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party." *Id.* at 107. A court should consider three factors in determining whether a party has waived its right to demand arbitration: "(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *Id.*

Blystad has not waived its right to demand arbitration. First, Blystad made its first demand for arbitration one week after filing its London claim. Second, there has not been extensive discovery or motion practice in the London proceeding, although Dreyfus notes that all relevant parties have appeared in the London action. Third, Blystad has not demonstrated any prejudice as a result of the London proceeding. *See id.* at 109 ("We have held that sufficient prejudice to sustain a finding of waiver exists when a party takes advantage of pre-trial discovery not available in arbitration."); *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993) ("Sufficient prejudice to infer waiver has been found when

a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense.") (citations omitted). Although Dreyfus makes much of the fact that Blystad initiated the London proceeding, even a party that initiates litigation does not waive its right to demand arbitration, absent a finding of prejudice. *See Zwitserse Maatschappij Van Levensverzekering En Lijfrente v. ABN International Capital Markets Corp.*, 996 F.2d 1478, 1479 (2d Cir. 1993) ("[A] party initiating judicial proceedings may waive its right to arbitration . . . when [that] party has unfairly used litigation prior to commencing arbitration in a way that might prejudice the opposing party.") (citations omitted).

## III. CONCLUSION

For the foregoing reasons, Dreyfus' motion for an order: (1) declaring that the claim brought by Blystad against Dreyfus is not subject to arbitration in New York; (2) staying any further proceedings in the pending New York arbitration; and (3) enforcing a choice of law/choice of forum provision stipulating that Blystad's claim must be brought in London is DENIED. The Clerk is directed to close this case.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
February 29, 2000